

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

DRC

EBERTO CUE,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 21404-18SL.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

**ORDER**

Pursuant to Rule 152(b), Tax Court Rules of Practice and Procedure, it is

ORDERED that the Clerk of the Court shall transmit herewith to petitioner and to respondent a copy of the pages of the transcript of the trial in the above case before Judge Joseph Robert Goeke at Miami, Florida containing his oral findings of fact and opinion rendered at the trial session at which this case was heard.

In accordance with the oral findings of fact and opinion, a decision will be entered for petitioner.

**(Signed) Joseph Robert Goeke**  
**Judge**

Dated: Washington, D.C.  
December 2, 2019

**SERVED Dec 03 2019**

1 Bench Opinion by Judge Joseph Robert Goeke  
2 November 15, 2019  
3 Eberto Cue v. Commissioner  
4 Docket No. 21404-18SL

5 THE COURT: The Court has decided to render oral  
6 findings of fact and opinion in this case, and the  
7 following represents the Court's oral findings of fact and  
8 opinion. The oral findings of fact and opinion shall not  
9 be relied upon as precedent in any other case.

10 This case was conducted under section 7463(a) of  
11 the Internal Revenue Code, which the petitioner elected.  
12 Pursuant to section 7463(b) <sup>the</sup> ~~that~~ decision we enter in this JRG  
13 case shall not be reviewed in any other court. This  
14 opinion is rendered pursuant to section 7459(b) and Rule  
15 152 of the Tax Court Rules of Practice and procedure.  
16 Hereinafter, references to sections are to the Internal  
17 Revenue Code in affect for the years at issue in this  
18 case.

19 In this case the petitioner challenges the  
20 filing of a federal tax lien for the years 2013 and 2014,  
21 income tax liabilities. The underlying liabilities,  
22 penalties, and interest are not in dispute. This Court  
23 has jurisdiction under section 6320(b)(4) and section  
24 6330(d)(1). The petitioner filed forms 1040 for taxable  
25 years 2013 and 2014, but the petitioner failed to fully

1 pay each respective liability for those years. Respondent  
2 assessed the tax liabilities, penalties, and interest.  
3 For two years before respondent filed the Notice of  
4 Federal Tax Lien in this case, the petitioner's tax  
5 liability was deemed uncollectable by respondent. The  
6 letter 3172 Notice of Federal Tax Lien Filing and Your  
7 Right to a Hearing Under IRC Section 6320 was issued by  
8 the respondent on May 3, 2018. This notice advised the  
9 petitioner that respondent had filed a federal tax lien  
10 due to unpaid income taxes for the years 2013 and 2014.

11 During the period while petitioner's taxes were  
12 deemed uncollectable, the petitioner did take steps to pay  
13 an outstanding obligation to the authority that ran his  
14 condo association, and sold a parking space for \$17,000.  
15 This event and petitioner's employment, which was obtained  
16 over this two-year period may have triggered respondent's  
17 scrutiny of petitioner's situation two years after his tax  
18 liability was deemed uncollectable, but in any event,  
19 respondent determined to file a Notice of Federal Tax  
20 Lien. After the filing of the Notice of Federal Tax Lien  
21 on June 1, 2018, the petitioner mailed Form 12153, Request  
22 for a Collection Due Process Hearing to the respondent.  
23 Petitioner requested that the notice of Federal Tax Lien  
24 be withdrawn, because of his currently non-collectable  
25 status, but he did not contest the underlying tax



1 liabilities or propose collection alternatives.

2 Respondent acknowledged the receipt of the Form  
3 12153, and advised the petitioner that he would have an  
4 opportunity to discuss his disagreements relative to the  
5 filing of the Notice of Federal Tax Lien, and seek  
6 collection alternatives in a letter dated July 31, 2018.  
7 On August 13, 2018 the settlement officer held a telephone  
8 conference with the petitioner. The settlement officer  
9 had prepared three options, which she proposed to the  
10 petitioner during that conference. These options would  
11 lead to the withdrawal of the Notice of Federal Tax Lien,  
12 based upon the settlement officer's representations to the  
13 petitioner on the telephone call. This is verified by the  
14 settlement officer's notes. These three options were that  
15 the petitioner enter into a direct debt installment  
16 agreement for \$475 a month to pay off the account within  
17 60 months; second, that the petitioner fully pay his tax  
18 liabilities; and third, that the petitioner provide  
19 documentation showing that he would lose his job if, in  
20 fact, the Notice of Federal Tax Lien was not withdrawn.

21 Petitioner had made the representation that the  
22 Notice of Federal Tax Lien would have major repercussions  
23 on his employment with the bank, if in fact, it was not  
24 withdrawn. Following the phone call, petitioner sent a  
25 letter dated August 14, 2018 together with the



1 documentation in support of his position that the lien  
2 would adversely affect his employment. He noted that he  
3 was licensed in his position with the bank, and he sent  
4 information which demonstrated that his license could be  
5 in jeopardy if he had outstanding tax liens. Among the  
6 documents the petitioner submitted was a document which  
7 showed that he had to authorize the licensing officials to  
8 do a credit check on him, and that if this credit check  
9 demonstrated outstanding federal tax liens that would be  
10 noted by the licensing officials adversely to his request  
11 to renew his license, which he had to renew every year  
12 based upon his position with the bank.

13 The settlement officer considered this  
14 information, but made a determination that the petitioner  
15 was already in breach of the licensing requirements, apart  
16 from the Notice of Federal Tax Lien filing. The  
17 settlement officer did not seriously consider petitioner's  
18 documentation, which would demonstrate that he would lose  
19 his job if, in fact, the Notice of Federal Tax Lien was  
20 not withdrawn. The Notice of Determination subsequently  
21 was issued based upon the settlement officer's  
22 determination that the Notice of Federal Tax Lien should  
23 not be withdrawn. On September 26, 2018, in that Notice  
24 of Determination the settlement officer explained as  
25 follows. "On August 27, 2018 the officer called you and



1 explained that the lien would not be withdrawn. The  
2 officer explained in the documentation that you sent it  
3 clearly stated that a person has shown that he is not  
4 financially responsible when he has shown a disregard in  
5 the management of his or her own financial condition. The  
6 officer explained that you already met that criteria when  
7 you owed the federal government, and when your home was  
8 foreclosed. The officer advised that she will be  
9 sustaining the lien, and the account will remain in  
10 currently non-collectable status. You had no further  
11 questions."

12 Subsequently, the petitioner filed a timely  
13 petition in this Court to seek review of this  
14 determination. The Notice of Determination also contains  
15 the following information. "The filing of the federal tax  
16 lien makes the IRS a secured creditor, which protects the  
17 government in the event that you sell assets or file  
18 bankruptcy. You failed to demonstrate that the Notice of  
19 Federal Tax Lien was overly intrusive, or that better  
20 alternatives are available, and it is my judgment that the  
21 Notice of Federal Tax Lien balanced the efficient  
22 collection of taxes with your legitimate concern that the  
23 collection action be no more intrusive than necessary."

24 Following the Notice of Federal Tax Lien,  
25 petitioner, based upon his responsibilities pursuant to



1 the license he had received, discussed his status with his  
2 employer and his supervisor. After some discussion with  
3 other authorities within the bank, the petitioner was  
4 advised on August 19, 2018 as follows. "You are ineligible  
5 to remain in your current position due to your outstanding  
6 tax lien."

7 Subsequently, petitioner lost his position with  
8 the bank, as he was not able to obtain a position in the  
9 bank for which his license was not required. Petitioner  
10 testified that he remains unemployed to this day and has  
11 supported himself through unemployment benefits and the  
12 assistance of his wife up to this point. It's noteworthy  
13 that petitioner's loss of his position eliminates his  
14 ability to make reasonable payments on his tax liability,  
15 and that the conditions set by the settlement officer  
16 included an amount which the petitioner could not possibly  
17 pay given his financial status. It is noteworthy that  
18 neither the petitioner nor the settlement officer proposed  
19 a lesser amount of monthly payments as a way that the  
20 petitioner could avoid a Notice of Federal Tax Lien  
21 filing.

22 When the underlying tax liability is properly at  
23 issue, the Court decides the issue of liability de novo,  
24 Sego v. Commissioner, 114 T.C. 604, 610 (2000). Since the  
25 underlying tax liability is not at issue in this case, the

1 Court will review the appeals officer's determination  
2 based upon an abuse of discretion standard. Giamelli v.  
3 Commissioner, 129 T.C. 107, 114 (2007). It is well  
4 established that when considering the collection  
5 alternative and balancing that alternative with the  
6 intrusion on the taxpayer, the appeals office must  
7 consider the relevant evidence that has been provided by  
8 the taxpayer. Olsen v. United States, 414 F.3d 144 (1st  
9 Circuit 2005). In applying the abuse of discretion standard  
10 this Court must determine whether the appeals officer  
11 exercised discretion in an arbitrary,<sup>or</sup> capricious,<sup>was</sup> or  
12 without sound basis in law. ~~fashion~~, Battle v.  
13 Commissioner, T.C. Memo 2009-171, and Woodral v.  
14 Commissioner, 112 T.C. 19 (1999).

15 This case boils down to the conditions provided  
16 by the settlement officer to the taxpayer and whether the  
17 analysis made by the settlement officer of the condition  
18 relative to the loss of employment was reasonable, or was  
19 arbitrary. There's no dispute that the settlement officer  
20 provided the three conditions I've outlined previously.  
21 Her analysis that the petitioner was already exposed to  
22 losing his license, because of his failure to pay the  
23 taxes overlooked the fact that the petitioner had been  
24 employed for some time, and was in a position to generate  
25 income, which ultimately may have been used to pay the tax



1 liability.

2           The petitioner placed his tax obligations behind  
3 debt associated with his residence, and he had a history  
4 of not paying his tax liabilities after having experienced  
5 financial setbacks in the end of the first decade of this  
6 century. However, it was unreasonable for the settlement  
7 officer to overlook the impact of the lien and its public  
8 filing on the petitioner's employment. Her failure to  
9 seriously consider the petitioner's assertions that he  
10 would lose his position demonstrates that the settlement  
11 officer did not seriously intend to act on the third  
12 condition that she provided the petitioner in the  
13 telephonic hearing. While we believe that petitioner  
14 could have been more aggressive over the course of his  
15 pending liability in trying to reach a payment agreement,  
16 and we note that the petitioner failed to follow through  
17 on two prior agreements, the fact that the settlement  
18 officer did not seek a reasonable payment from the  
19 petition demonstrates that the settlement officer was not  
20 actually interested in generating collection from the  
21 petitioner, but merely wished to sustain the Notice of  
22 Federal Tax Lien.

23           Given these circumstances, we believe the  
24 settlement officer's actions were arbitrary and  
25 capricious, and we sustain the petitioner's argument that



1 the Notice of Federal Tax Lien should be withdrawn. We  
2 note that having lost his job the petitioner is ~~in~~ less  
3 likely ~~a position~~ to actually make payments on his federal  
4 tax liability, which is unfortunate. ~~And we~~ <sup>We</sup> do not look  
5 at his current situation and the government's need to  
6 maintain the ability to collect from the equity petitioner  
7 might have in his condo in analyzing this situation.  
8 Rather, we look at the actual analysis of the settlement  
9 officer, contemporaneous with the determination, which was  
10 made in this case, that analysis we find to be arbitrary  
11 and capricious.

12 Therefore, a decision will be entered for the  
13 petitioner.

14 This concludes the Court's oral findings of fact  
15 and opinion in this case.

16 (Whereupon, at 9:46 a.m., the above-entitled  
17 matter was concluded.)

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